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9 **UNITED STATES DISTRICT COURT**  
10 **SOUTHERN DISTRICT OF CALIFORNIA**  
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12 PHUOC LUU,

13 Petitioner,

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15 vs.  
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19 JEFFREY BEARD, Secretary,

20 Respondent.  
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CASE NO. 13cv1182-MMA (RBB)

**ORDER ADOPTING REPORT AND  
RECOMMENDATION OF UNITED  
STATES MAGISTRATE JUDGE;**

[Doc. No. 12]

**OVERRULING PETITIONER'S  
OBJECTIONS**

[Doc. No. 13]

**GRANTING MOTION TO DISMISS**

[Doc. No. 11]

**DISMISSING PETITIONER'S  
PETITION WITH PREJUDICE**

[Doc. No. 1]

23  
24 Petitioner Phuoc Luu, a state prisoner proceeding *pro se*, filed a petition for  
25 writ of habeas corpus ("petition") pursuant to 28 U.S.C. § 2254. *See* Doc. No. 1.  
26 Petitioner alleges he was denied due process during a prison investigation regarding  
27 his purported involvement in a conspiracy to murder a prison staff member.  
28 Petitioner also seeks to expunge all references to this allegation from his central file.

Respondent filed a motion to dismiss, asserting two grounds for dismissal: (1) the petition is untimely under the statute of limitations, and (2) the petition does not seek cognizable federal habeas relief. *See* Doc. No. 11. Petitioner did not file an opposition to Respondent's motion.

The matter was referred to United States Magistrate Judge Ruben B. Brooks for preparation of a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1), and Civil Local Rule HC.2. Judge Brooks issued a well-reasoned and thorough Report recommending the Court grant Respondent's motion to dismiss the petition as untimely. *See* Doc. No. 12. Petitioner filed objections to the Report and Recommendation. *See* Doc. No. 13.

## **DISCUSSION**

### ***1. Standard of Review***

Pursuant to Rule 72 of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1), the Court must "make a de novo determination of those portions of the report . . . to which objection is made," and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge]." 28 U.S.C. § 636(b)(1); *see also United States v. Remsing*, 874 F.2d 614, 617 (9th Cir. 1989).

### ***2. Analysis***

Petitioner does not object to the magistrate judge's reasoning or conclusions, but instead attempts to assert a claim of actual innocence under *Schlup v. Delo*, 513 U.S. 298 (1995). Specifically, Petitioner contends the statute of limitations should not bar his petition because he is actually innocent of the prison disciplinary charge of conspiracy. However, "[t]he *Schlup* exception involves a narrow class of cases . . . implicating a fundamental miscarriage of justice because a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Lee v. Lampert*, 653 F.3d 929, 937 (9th Cir. 2011) (quoting *Schlup*, 513 U.S. at 314–15) (internal quotation marks omitted). Here, Petitioner does not challenge his

1 underlying state court conviction,<sup>1</sup> but rather the outcome of a “prison disciplinary  
 2 matter.” Pet. at 1. Therefore, *Schlup* is inapplicable. *See Schlup*, 513 U.S. at 324  
 3 (recognizing “the claimed injustice is that constitutional error has resulted in the  
 4 conviction of one who is actually innocent of the crime”); *see also Sistrunk v.*  
 5 *Armenakis*, 292 F.3d 669, 673 (9th Cir. 2002) (“In order to pass through the *Schlup*  
 6 gateway, a petitioner must show that it is more likely than not that no reasonable  
 7 juror would have convicted him in the light of the new evidence.”) (internal citation  
 8 and quotations omitted). Accordingly, the Court **OVERRULES** Petitioner’s  
 9 objections and **ADOPTS** the Report and Recommendation in its entirety.

#### 10 CERTIFICATE OF APPEALABILITY

11 Rule 11 of the Federal Rules Governing Section 2254 Cases states that “the  
 12 district court must issue or deny a certificate of appealability when it enters a final  
 13 order adverse to the applicant.” A certificate of appealability is not issued unless  
 14 there is “a substantial showing of the denial of a constitutional right.” 28 U.S.C. §  
 15 2253(c)(2). Under this standard, a petitioner must show that reasonable jurists could  
 16 debate whether the petition should have been resolved in a different manner or that  
 17 the issues presented were adequate to deserve encouragement to proceed further.  
 18 *Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003), quoting *Slack v. McDaniel*, 529  
 19 U.S. 473, 484 (2000). Petitioner has not made the requisite showing. Accordingly,  
 20 the Court **DECLINES** to issue a certificate of appealability as to any claims or  
 21 issues raised in his petition.

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28 <sup>1</sup> In his petition, Petitioner states that he “does not challenge his current  
 commitment offenses.” Pet. at 9.

**CONCLUSION**

Based on the foregoing, the Court **ADOPTS** the Report and Recommendation in its entirety, **OVERRULES** Petitioner's Objections, **GRANTS** Respondent's Motion to Dismiss, and **DISMISSES** Petitioner's petition with prejudice. The Court **DECLINES** to issue a certificate of appealability.

**IT IS SO ORDERED.**

DATED: June 12, 2014



Hon. Michael M. Anello  
United States District Judge